

Before the
COPYRIGHT ROYALTY BOARD
United States Copyright Office
Washington, DC

In re

Distribution of Digital Audio Recording
Royalty Funds

CONSOLIDATED
Docket No. 2008-3 CRB DD
(2007-2011 SRF)

MOTION TO REJECT POWELL’S
ECRB COMPUTER SOFTWARE PROBLEMS NOTICE

Pursuant to section 350.6(g) and (h)(2) of the Copyright Royalty Board (“CRB”) regulations as well as the CRB orders dated February 27, 2019 and March 25, 2019, the Alliance of Artists and Recording Companies (“AARC”) hereby respectfully requests that the CRB reject David Powell’s (“Powell”) “3rd Notice of Averement /sic/ Continuous Action” (“Powell Notice”) filing. 37 C.F.R. §§ 350.6(g), (h)(2) (2019); Order Granting AARC Motion to Reject David Powell’s Defective Filings and Dismissing David Powell, In the Matter of Distribution of Digital Audio Recording Royalty Funds, CONSOLIDATED Docket No. 2008-3 CRB DD (2007-2011 SRF) (Feb. 27, 2019) (“Order Dismissing Powell”); Order Denying Powell Motion, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (Mar. 25, 2019) (“Order Denying Powell Motion”); 3rd Notice of Averement Continuous Action, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (Mar. 21, 2019) (“Powell Notice”).

Background

On March 21, 2019, the CRB received the Powell Notice in paper form.¹ In his filing, Powell, citing section 350.5(m), alleges technical problems with the eCRB filing system, claiming that he has experienced “predicated repeated pattern of eCRB online technical problems,” was denied “online access to proper pop up screen sequence” and was “repeat[edly] reject[ed]” while attempting to “file [a motion] seeking leave for enlargement of time to refile Petition to Participate.”² Powell Notice at 1; 37 C.F.R. § 350.5(m) (2019). Powell also makes numerous baseless and defamatory statements about the CRB and its employees, accusing them of “Practice and Pattern of Persistent Vexatious Delay Harassment,” “wire fraud,” “deny[ing] Mr. Powell equal computer access to eCRB.gov.” and “disparate treatment” of Powell. Powell Notice at 2. Finally, he proclaims, with no explanation, that “Mr. Powell has a substantial significant interest.” Powell Notice at 2.

The Powell Notice Should Be Rejected Because It Is Procedurally Defective

The Powell Notice should be rejected because Powell never served it on AARC. Powell noted at the end of his filing that only the Copyright Royalty Board was sent the notice. Powell Notice at 3. Although he alleges in the section directly above his Proof of Delivery statement, that he “will notify parties by text, email or mail eCRB reply,” AARC never received a copy of the filing. Id. AARC found Powell’s defective filing only after scrolling through the document

¹ Powell claims in his Proof of Delivery statement that the Notice was sent on March 19, 2019. Powell Notice at 3. However, the official filing date as reflected in the eCRB system is March 21, 2019.

² Powell attached to his notice, several unrelated documents, including “Common agent d/b/a/ David Powell & Circle God Network Inc. motion for Seeking leave for enlargement of time to cure defects ss. 351.1(d),” which he successfully uploaded to the eCRB on March 13, 2019, and was dismissed by the CRB on March 25, 2019. Powell Notice at 4; Order Denying Powell Motion for Enlargement of Time, In the Matter of Distribution of Digital Audio Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (Mar. 25, 2019) (“Order Denying Powell Motion for Enlargement of Time”).

list in the eCRB system on April 22, 2019. Moreover, AARC was never contacted by Powell about being nor did AARC agree to be served by other means. See 37 C.F.R. § 350.6(h)(2).

According to section 350.6(h)(2), for all non-eCRB filed documents, each party must deliver *all* filings “to the other parties” “by means no slower than overnight express mail sent on the same day they file the documents, or by such other means as the parties may agree in writing among themselves.” Id.; see also 37 C.F.R. § 350.6(g) (“For all paper filings, a party must deliver a copy of the document to counsel for all other parties identified in the participant list, or, if the party is unrepresented by counsel, to the party itself.”)

Therefore, Powell’s filing is procedurally defective and should be rejected for failure to serve the other parties.³ 37 C.F.R. §§ 350.6(g), (h)(2); see e.g., Order Denying Four Motions from David Powell, In the Matter of Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and “Preexisting” Subscription Services (SDARS III), Docket No. 16-CRB-0001 SR/PSSR (2018-2022) (Aug. 16, 2016) (“Mr. Powell also did not serve the filings on the other participants as required . . . the Judges would not be able to accept this filing.”); Order Denying Motion to Accept Late Petition to Participate, In the Matter of Distribution of Cable Royalty Funds, Docket No. 14-CRB-0007 CD (2010-12) (Apr. 22, 2015) (denying the motion because of the moving party’s failure to serve it on the other parties in this proceeding).

The Powell Notice Should Be Rejected Because Powell Is Not A Participant

Even if the CRB were to accept Powell’s filing, irrespective of his failure to serve the other parties, it should be rejected because it impermissibly goes beyond a mere notification of

³ AARC does not have direct knowledge as to whether Herman Kelly was served with Powell’s filing. However, Powell’s “Proof of Delivery” does not specifically list any of the parties in this proceeding. Powell Notice at 3. It only lists the “Copyright Royalty Board.” Id.

the technical difficulty with the eCRB system pursuant to section 350.5(m). 37 C.F.R. § 350.5(m). This regulation requires any filer, encountering technical problems with an eCRB filing, to “immediately notify the Copyright Royalty Board of the problem either by email or by telephone, followed promptly by written confirmation.” Id. Powell’s filing, however, does not stop at a technical issue notification, it goes on to allege that, “Mr. Powell has a substantial significant interest.” Powell Notice at 2.

We recognize that a notice of technical difficulty with the eCRB system may constitute an acceptable filing given Powell’s alleged inability to upload a document to the eCRB. It is worth noting, however, that Powell submits no proof of his “predicated repeated pattern of eCRB online technical problems.” Powell Notice at 1. In fact, the document that Powell alleges he could not upload, “Seeking Leave for Enlargement of Time to refile Petition to Participate,” and which he attached to his notice, was successfully uploaded to the eCRB on March 13, 2019, and was dismissed by the CRB on March 25, 2019. Powell Notice at 1, 4; Order Denying Powell Motion for Enlargement of Time.

Consequently, it does not appear that the Powell Notice is a notification of technical issues, since Powell successfully uploaded the document in issue. While it does not notify the CRB of technical difficulties, it does, instead, serve as a vehicle for Powell to hurl defamatory accusations at the “the Copyright Royalty Board & its employees.” Powell Notice at 2. Powell accuses them of “wire fraud,” “deny[ing] Mr. Powell equal computer access to eCRB.gov.” and “disparate treatment” of Powell. Id. These derogatory accusations are baseless and ludicrous.

Powell’s notice also attempts to correct his defective Petitions to Participate, dated December 20, 2018 and January 24, 2019, by proclaiming, without basis, that he has “a substantial significant interest” in this proceeding. Powell Notice at 2; Verified Motion Petition

to Participate for Dart Partial and Final Distribution, Agreed Yes W/ Settling Parties and Allocation Phase Parties I and II and Added to Settlement List, In the Matter of Distribution of Any Consolidated Dart Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (Dec. 20, 2018); Verified Motion Petition to Participate for Dart Partial and Final Distribution, Agreed Yes W/ Settling Parties and Allocation Phase Parties I and II and Added to Settlement List, In the Matter of Distribution of Any Consolidated Dart Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (2007-2011 SRF) (Jan. 24, 2019). However, Powell is not a participant in this proceeding pursuant to the CRB's order rejecting Powell's defective Petitions to Participate and dismissing Powell from the proceeding. Order Dismissing Powell. The CRB, in its March 25, 2019 order, clearly declared that it "will accept no other motions or *filings of any kind from Mr. Powell in this proceeding*" unless "(a) Mr. Powell files a motion for leave to file a late Petition to Participate, (b) the Judges grant that motion, and (c) Mr. Powell files a late Petition to Participate." Order Denying Powell Motion (emphasis added). Accordingly, Powell is not permitted to file any documents to amend his defective petitions because no motion seeking leave to file a late petition has yet been filed by Powell and granted by the CRB. See id.; see also Order Dismissing Powell. This defective document should be rejected because Powell is not a participant in this proceeding. See Order Denying Powell Motion; see also Order Dismissing Powell.

Lastly, Powell's bald assertion of "significant interest" cannot cure the defects in his original Petitions to Participate. His petitions were rejected by the CRB, which led to his dismissal, because Powell failed to state his significant interest in the proceeding and to identify by year each subfund to which his is asserting a claim. Order Dismissing Powell; Motion to Reject David Powell's Defective Filings, In the Matter of Distribution of Digital Audio

Recording Royalty Funds, Docket No. CONSOLIDATED 2008-3 CRB DD (Feb. 6, 2019). The CRB determined that if Powell, “wishes to participate in this proceeding, the Judges direct him to promptly file a motion seeking leave to file a late Petition to Participate and *stating reasons (supported by facts and arguments)* the Judges should find that his request meets the conditions in section 351.1(d). Order Dismissing Powell at 3-4; 37 C.F.R. § 351.1(d). To date, Powell has not done so.

WHEREFORE, in view of the foregoing, AARC respectfully requests that the CRB reject Powell’s filing as defective on the grounds of procedure and merit.

Respectfully submitted,
On Behalf of AARC

/s/Linda R. Bocchi, Esq.
Linda R. Bocchi, Esq.
DC BAR# 338012
VA BAR# 77599
Executive Director
Alliance of Artists and Recording Companies
700 N. Fairfax Street, Suite 601
Alexandria, VA 22314
(703) 535-8101 (phone)
(703) 535-8105 (facsimile)
lbocchi@aacroyalties.com

April 23, 2019

Proof of Delivery

I hereby certify that on Tuesday, April 23, 2019 I provided a true and correct copy of the Motion to Reject Powell Notice to the following:

Kelly, Herman, represented by HERMAN KELLY MR served via Electronic Service at hermankelly@att.net

Signed: /s/ Linda R Bocchi